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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 698

DANIEL F. BOONE,

Petitioner,

vs.

CLARENCE M. LIGHTNER, THEODORE A. LIGHTNER, MRS. ALICE LIGHTNER HOPF, MRS. MARTHA LIGHTNER BOONE AND MARTHA PENELOPE BOONE, A MINOR REPRESENTED IN THIS PROCEEDING BY HER NEXT FRIEND, W. C. HAGUE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF FOR RESPONDENTS.

J. E. SHIPMAN,
Of Counsel.

M. R. McCOWN,
Counsel for Respondents.

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BRIEF FOR RESPONDENTS.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondents respectfully submit to your honorable court the following brief:

Statement of Matter Involved.

This action was commenced by the respondents against the petitioner in the Superior Court of Polk County, North Carolina, by a summons duly issued June 21, 1941, and

personally served upon the petitioner on June 23, 1941 (R. 1-2).

In their complaint the respondents sought an accounting and declaration of the terms of the trust fund referred to therein, and expressed apprehension of the safety of the fund and sought the oversight of the court to safeguard and protect the rights of the minor beneficiary (R. 2-7). The petitioner, on August 5, 1941, answered, admitting the receipt of the fund and promising when he "has a little time" to have a statement made up disclosing the status of the fund and further alleged that he changed his residence from the State of North Carolina to Washington, D. C., on June 23, 1941, the day service was made on him, and that the North Carolina court did not have jurisdiction of the trust (R. 20-30). The petitioner in his answer alleged a purported declaration of trust executed by Clarence A. Lightner, and took the position that under said declaration he was not accountable to the court for the manner in which he discharged the trust.

The respondents replied to this further defense set up in the answer and alleged that at the time said paper writing was purported to have been executed, the said Clarence A. Lightner was without mental capacity to execute the same (R. 31-32).

The deposition of the petitioner on his own behalf was taken in Washington, D. C., at his instance, on August 15, 1941, at which time he was represented by Clifford M. Toohy, Esq., of Detroit, Michigan (R. 44). On November 3, 1941, the deposition of David S. Patterson was taken in New York on behalf of the respondents, and the petitioner attended in person and was represented by counsel (R. 44).

On November 5, 1941, certain depositions were taken in New York on behalf of the petitioner, and in addition to

local counsel representing the petitioner Mr. Toohy was also present, as was the petitioner (R. 44).

The cause regularly came on for trial at the January-February, 1942 term of Polk County Superior Court, and the petitioner moved for a continuance under the provisions of the Soldiers' and Sailors' Civil Relief Act. His attorney, Major Roy L. Deal, who made and argued the motion for the continuance, then stated to the court: "That he expected to be called in the service of the United States Army, and that he would be unable to try the case", and requested that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel (R. 34). An order was made granting the motion and transferring the cause from Polk County Superior Court to Henderson County Superior Court, peremptorily setting the case for trial on May 25, 1942, and a copy of this order was certified to the Adjutant General of the United States Army (R. 41-42).

When the matter was reached in accordance with this order in Henderson County Superior Court on May 25, 1942, a further motion for a continuance was filed in petitioner's behalf based on the Soldiers' and Sailors' Civil Relief Act, which motion was supported by the affidavits of petitioner (R. 46), and of Major Roy L. Deal (R. 48-49). In opposition to this motion, the respondents presented to the court the entire record consisting of the pleadings, the depositions which had been taken on behalf of both the petitioner and respondents, and the statement of receipts and disbursements filed that day by counsel then appearing for the petitioner (R. 42-46). They further called the court's attention to the provision in the order made by the court at the January-February, 1942, term of Polk County Superior Court requiring the Clerk of the Court to certify a copy of that order to the Adjutant General of the United

States Army, "who shall, if he deems it necessary, submit it to such of his subordinates or superiors of the said Captain Boone as he may deem proper" (R. 42), and to the absence of any statement in the petitioner's affidavit that he endeavored to procure a leave of absence and failed to obtain one.

The motion for the continuance was denied, and the findings and opinion of the trial judge are set forth in the order (R. 49), and judgment (R. 33). The court found as a fact "that the Honorable Roy L. Deal at the January-February Term, of the Superior Court of North Carolina, in Polk County, in open court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal, was expecting to be called into the military service immediately, and that it therefore would be necessary for the defendant to procure additional legal counsel" (R. 50). The court further found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case, and that his military service has not prevented him from doing this" (R. 34).

After fully considering the affidavits for the motion, and the record in opposition, and after argument by counsel representing all parties, the court expressed the opinion and found as a fact "that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation" (R. 50).

Counsel then representing the petitioner withdrew and the trial proceeded in the absence of the defendant and of any counsel representing the defendant (R. 51), and after issues were submitted to the jury and answered as shown, the judgment was entered (R. 33). The firm of Williams and Cocke, of which firm Mr. R. R. Williams is a member, and who appeared and argued the motion for a continuance,

appeared and entered an appeal for the petitioner to the Supreme Court of North Carolina. On November 4, 1942, the Supreme Court of North Carolina rendered an affirming opinion (R. 127-132), which is reported in 222 N. C. 205, 22 S. E. (2d) 426. This Court granted certiorari March 8th, 1943.

Questions Presented.

1. Under the provisions of the Soldiers' and Sailors' Civil Relief Act, and under the facts shown by the record, is the question of continuance discretionary with the trial court?

2. Can the petitioner now raise for the first time the question that there was no evidence to support the trial court's finding of facts?

3. Should the judgment of the lower court be reversed when it conclusively appears that the correct result has been reached?

Summary of Argument.

The argument of the respondents, briefly summarized, is,

(a), that under the provisions of the Soldiers' and Sailors' Civil Relief Act the trial court shall stay a proceeding against a person in military service *unless in the opinion of the Court the ability of the defendant to conduct his defense is not materially affected by reason of his military service;*

(b), that the facts in the case at bar fully warranted the trial court in reaching that conclusion and in denying petitioner's motion for continuance, and

(c), that a reversal of the ruling complained of could not benefit petitioner in a subsequent trial as the correct result has been reached.

ARGUMENT.

Point 1.

Under the provisions of the Soldiers and Sailors Civil Relief Act, a continuance is properly refused upon the finding of the trial court that the ability of the defendant to conduct his defense is not materially affected by reason of his military service.

The question involved in this case is the interpretation of Section 201 of the Soldiers and Sailors Civil Relief Act of 1940. 50 U. S. C. A. App. 521. The petitioner contends that in the trial court and in the Supreme Court of North Carolina this section was not properly construed, and the respondents contend to the contrary.

So far as our study has disclosed, this is the first case involving this act to reach the Supreme Court of the United States. There are a number of decisions from State courts and Federal courts dealing with the act, and most of these cases are mentioned and annotated in American Law Reports Annotated as follows:

130 A. L. R. 774; 137 A. L. R. 451;
140 A. L. R. 1509; 141 A. L. R. 1515;
142 A. L. R. 1514.

While none of these cases seem to be directly in point with the case at bar, we will discuss certain language used by the courts, after first considering the language of the Act itself.

In the case at bar, the decision must turn upon the proper construction of the words in Section 201 of the Act, that

> "At any stage thereof any action or proceeding in any court in which a person in military service is involved * * * the court in which it is pending * * * shall, on application to it by such person or some other

person on his behalf, be stayed as provided in this Act, *unless, in the opinion of the Court the ability of • • • the defendant to conduct his defense is not materially affected by reason of his military service.*" (Italics ours.)

This language is unambiguous. It is clear that Congress did not intend to exempt those in military service from service of process, but clearly intended that suits could be commenced as usual, and vested the trial court with discretionary power to see that the rights of service men were protected. In plain language the Act says that the trial court shall stay the action unless it is the opinion of the court that the ability of the defendant to conduct his defense is not materially affected by reason of his military service. It will thus be seen that Congress had in mind the rights of those who might bring actions against those in the military service. Unless Congress had specifically intended to protect the rights of those creditors and others who might have cause to sue a service man, the act would undoubtedly have been phrased in different language, and all suits against service men forbidden. Since the Act is not thus written, the courts should not determine that all actions in which a person in the military service is involved should be stayed upon application being made. If the legislative body had meant this it would have said so, and the italicized provision of the section above would not have been inserted.

We respectfully submit that the facts in the case at bar show with considerable force the wisdom of Congress in providing that some actions against men in the service should be stayed, and that others should be permitted to proceed, depending upon the factual finding of the trial court. To enlarge upon this thought calls for a discussion of the facts, and at the risk of being tedious, we will refer to them at some length.

It was apparent from the pleadings that trust funds belonging to a three year old infant were involved. The trial court, upon the trust being admitted by the defendant, immediately recognized the necessity for protecting the rights of the infant. Authority for this duty on the part of the court is hardly necessary, but in view of the contention of the defendant in his answer that the trust was not as contended for by the plaintiffs, and in order to show that the duty applies to all trust funds in which minors are beneficially interested, we will quote from the opinion of Judge Stacy:

> "It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. Carter *v.* Young, 193 N. C. 678, 137 S. E. 875. As said by Merrimon, J., in Albright *v.* Albright, 91 N. C. 220, 'However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the deteriment of the cestui que trust, the court will promptly interpose its protective authority.' See Young *v.* Hood, 209 N. C. 801, 184 S. E. 823; Heyer *v.* Bulluck, 210 N. C. 321, 186 S. E. 356, and cases there cited."

Having become cognizant of the subject matter of the case when it was reached on the trial docket at the January-February Term of Polk County Superior Court, the trial judge disposed of the defendant's motion for a continuance in the order set forth on the pages 41 and 42 of the record. The motion for continuance was allowed in the discretion of the court, although the court expressed the opinion "that it should at the earliest practical date ascertain the exact status of the trust fund referred to in the pleadings." It appears from the subsequent order of May 25, 1942 (R. 49) "that the Hon. Roy L. Deal, at the January-February term of Superior Court of North Carolina, in Polk County, in

open court, requested that the action be not set until this date, stating at said time that he, the said Judge Deal, was expecting to be called immediately into the military service, and that therefore it would be necessary for the defendant to procure additional legal counsel." There was an intervening term of Henderson County court between the January-February term of Polk County Superior Court and the May-June term of Henderson County Superior Court, and it is a fair inference that the case was continued until the May-June term of Henderson County Superior Court and peremptorily set for trial on May 25th, 1942, in order to give the defendant ample time to procure other counsel. The court further provided "in order that the said defendant may be fully advised, and that his superior officers may be fully advised of the importance of the litigation in question, it is directed that the Clerk of the Superior Court of Polk County, State of North Carolina, shall certify a copy of this order and forward the same to the Adjutant General of the United States Army, War Department, Washington, D. C., who shall, if he deems it necessary, submit it to such of his subordinates or superiors of the said Captain Boone as he may deem proper" (R. 42). No exception was made to the part of the order continuing the cause and directing its removal to Henderson County, but all other parts of the order were excepted to (R. 42).

The facts which were presented to the trial judge when he considered the defendant's motion for a continuance at the January-February Term of Polk County Superior Court, and again at the May-June term of Henderson County Superior Court were not brought forward in the record in making up the case on appeal for the obvious reason that the defendant in making up the assignments of error did not then take the position, as he does now, that there was no evidence on which the court could make a factual finding that the ability of the defendant to con-

duct his defense was not materially affected by reason of his military service. The assignments of error on this point are Nos. one and two, pages 117 and 118 of the record, and no other assignments of error relate to the refusal of the trial court to grant the continuance. The complaint of the defendant in said assignments of error was that "the court failed to make a finding that the defense of the action by the defendant would not be hindered." This is clearly an attempt on the part of the defendant to change his position on this point, and we submit that it is now too late to present the question. It cannot be doubted that when both sides were heard when the motion was argued that certain facts were presented to the court, and this is indicated by the court "finding as a fact that the motion to continue is made after the defendant's refusal in one or more instances arising out of litigation respecting the subject matter and personnel involved in this action to appear in the courts of North Carolina, even on citation for contempt, that the defendant is not, upon the motion for continuance, acting in good faith" (R. 50), and further indicated by the court's direction that a certified copy of the order be transmitted to the Adjutant General of the United States Army.

Having made the point that it is now too late for the defendant to say that there was no evidence to support the findings of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service, we think the record discloses full and ample evidence to support the finding of facts of the court below, and if the point now presented had been raised in proper time it could not have been sustained. It is very obvious that the court was justified in concluding "that the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is

exercising his assumed right under the act referred to above to avoid such determination" (R. 50). In his brief in the Supreme Court of North Carolina counsel for the defendant squarely took the position that it was the right of the defendant to so use the Soldiers and Sailors Civil Relief Act, and if the defendant saw fit he could wilfully and deliberately absent himself, and invoke the provisions of the Act. We do not think this is in keeping with the spirit or intent of the Act.

The communication by the court directed to the Adjutant General of the United States Army was an official communication. The defendant was fully advised of it. Being a Major, he must have known that upon proper request being made, leave would have been granted. But it negatively appears that he did not ask for a leave in that his unsupported affidavit was all that was offered to the court to the effect that he could not obtain a leave. Significantly absent from petitioner's affidavit is a statement that petitioner applied for leave and the application was denied. Can the Act be invoked where the soldier does not want to obtain leave? It may fairly be asked in the light of the record how could the court put any credence in his affidavit. In his answer, filed on August 5th, 1941, he swore "that he has handled this fund as a reasonably prudent man would have handled it; that he has used his best judgment and good faith in this matter; that he has not dissipated one penny of the fund, nor has he made any withdrawals from the fund since the day the money was turned over to him" (R. 26). The deposition of the defendant was taken in Washington, D. C., on August 15th, 1941, and it appears from page 52 of the record that the charge of the court reporter for taking this deposition was $66.00. While the deposition is not brought forward in the record, its length may be inferred by the charge made for taking the same, and certainly it cannot be suggested that the defendant

swore to facts inconsistent with his verified answer. The period of time involved was only ten days between the filing of the answer, and the taking of the deposition.

There can be no doubt about the fact that the trust fund of $15,449.10 was deposited in the Wachovia Bank & Trust Company of Winston-Salem, North Carolina, on January 6, 1939 (R. 58), nor can there be any doubt of the fact that when the balance in the bank account was only $15,658.83 the defendant issued the check marked Exhibit E to E. A. Pierce & Company for $3,498.00 (R. 105), and that the same was charged to the bank account on March 7, 1939 (R. 59). A further check to the same firm for $2,313.00 was issued by the defendant (R. 106), and charged to the account on March 9, 1939 (R. 79). In due course followed the checks for $1,100.00 (R. 107), and for $3,535.00 (R. 107), which were charged on April 7 and April 19th, 1939 respectively (R. 60). The record continues the transactions in detail.

It should be borne in mind that although the defendant was a trustee and therefore had a positive and personal knowledge of how the funds had been handled, that the true facts were not shown until brought to light by the plaintiffs. Instead the defendant followed the positive statements in his answer as above quoted with evasions to the effect "that the Polk County Court has no jurisdiction over his management of said fund for his minor daughter" (R. 24), and "that as soon as he is discharged as a patient at Walter Reed Hospital, Washington, D. C., and has a little time in which to engage a certified public accountant, that he plans to have a statement made up as previously stated in this pleading; defendant further alleges that he is at all times anxious to conduct the affairs of this fund in such a way that it will be for the best interests of his minor daughter, Martha Penelope Boone" (R. 26). The only report forthcoming is that shown on pages 42 to 46 of the record. In the light of the facts,

no comment should be necessary as to the accuracy of this report. It should be noted that eight items therein, aggregating $1,042.73, represented payments made by the defendant in preparing his defense in this action. The defendant has been almost too definite in the matter of keeping his expense items as contrasted to the indefinite way in which he kept account of the more important items of the trust. It should not be overlooked that he ended the report with the significant item "expenses incurred since Judge Sink's order of February 2, 1942, are not included in this statement."

The depositions which were before the judge when he passed on the motion for continuance further showed that when this action was brought on July 21, 1941, the defendant was still carrying a marginal account with his brokers with the stocks which he now says composed the trust pledged as security, and that on June 27th, 1941, he owed the brokers $6,744.26 (R. 90). After the action was commenced, he obtained delivery of the stocks which he turned over to the Clerk of the Superior Court of Henderson County, pursuant to the order of Judge Sink. In addition to the stocks so turned over there were delivered to petitioner by the brokers 100 shares of Packard Motor Car Company, and 100 shares of Greyhound Corporation (R. 91). There is no explanation as to why these additional shares were not a part of the trust fund. It should be noted that 100 shares of Greyhound stock was purchased on April 18, 1939, for $1,726.50 (R. 73), and 100 shares of said Greyhound stock was purchased on March 8, 1939 for $2,302.50 (R. 72), and that when the defendant filed his purported accounting the trust was charged with the higher amount, although all of the said Greyhound stock was received by him at the same time, and was purchased with the trust funds.

We respectfully submit that the facts are so clear that no further argument or comment is necessary. They tell their own story, and certainly the trial court who was the sole judge of the weight to be given the affidavit of the defendant was justified in putting no credence whatever in the statement that the defendant could not obtain a leave of absence to attend the trial.

As to the affidavit of Mr. Deal, he had already told the court in person that he could not appear further in the case, and that the defendant would have to procure other counsel.

Furthermore, we respectfully submit that the trial court could only reach the conclusion that the defendant had first attempted a defense by concealing the true facts, and had filed his answer and made his deposition in that effort, and that the true facts having been brought out by the depositions of Mr. Patterson and Mr. Alspaugh in so conclusive and irrefutable a manner, that the defendant could only conclude that the sanctuary of the Soldiers and Sailors Civil Relief Act was his only recourse. We respectfully submit that it is clear, in view of this record, that the defendant could not do otherwise in attempting to save his face than absent himself from the court, and that the trial judge was not mistaken in his conclusion that the defendant did not have a defense. Inasmuch as this conclusion was practically irresistible under the facts, how can it be said that his military service has deprived the defendant of that which he never had?

We respectfully submit that the positions taken in the foregoing argument are supported by the following authorities:

Ebert v. *Poston*, 266 U. S. 548, 69 L. Ed. 435; 45 S. Ct. 188, where it is said that the judicial function to be exercised in construing a statute is limited to ascertaining the intention of the Legislature therein expressed. If the con-

tention of the petitioner is to prevail, it would mean reading into the Act a provision that all actions against men in service must be stayed, irrespective of the findings of the trial court on the question that the ability of the defendant to conduct his defense is not materially affected by reason of his military service.

In 130 A. L. R. 784, it is said:

> "The application of the remedies which the Soldiers and Sailors Civil Relief Act affords is left largely to the discretion of the trial court, and in the absence of a showing of an abuse of such discretion the decisions of such courts will not be disturbed." (Citing cases.)

In the case of *Tulley* v. *Superior Court* (1941), 45 Cal. App. (2d) 29, 113 P (2d) 477, referring to the Soldiers and Sailors Civil Relief Act of 1940, it is said:

> "Under that statute or independent of that statute, the trial courts possess ample power to protect the rights of those in the military service of the United States. It is inconceivable that in a proper case, the trial court, upon a proper showing, would not grant a reasonable continuance to one engaged in military service to permit him to properly prepare his defense, and, if necessary, continue such case during the period of the defendant's foreign service."

In the annotation in 140 A. L. R. 1510, it is said:

> "And it was held in *Swiderski* v. *Moodenbaugh* (1942), 44 F. Supp. 687, that it was discretionary with the court whether or not to grant a stay, it being the duty of the court to exercise sound judgment to avoid injury to a soldier devoting himself to the service of his country, and on the other hand to prevent use of the shield for the protection of others not so devoted."

In that case the trial judge, Hon. James Alger Fee, at page 790, says:

> "The statute indicates that the discretion of the trial court is absolute and without review."

In the case of *Royster* v. *Ledderle*, from the Sixth Circuit Court of Appeals, decided in 1942 (128 F. (2d) 197):

> "The object of the Act was to prevent civil injury to the civil rights of those in the armed services of the United States during that service, in order that they would be free to devote all of their energies to the military needs of the nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the act is inapplicable."

Under this authority it may be doubted whether or not under the particular facts of the case at bar the provisions of the Soldiers and Sailors Civil Relief Act are available to the defendant, for the following reasons:

(a) That in the showing made by the petitioner to the court in his effort to obtain a continuance, there is an entire absence of any factual allegation or proof that the petitioner has a valid defense or that his rights will be prejudiced by a proceeding against him;

(b) That it may be doubted that the act applies to obligations incurred by a trustee as the result of a breach of his trust;

(c) That it is inconceivable that Congress intended to relieve persons in the military service of the United States of their duties incident to the trusteeship of property belonging to minors, and to permit the use of the act to avoid an accounting by a trustee where a *prima facie* case of breach of trust is submitted to the court.

As to the point that the trial court did not appoint counsel to represent the defendant after the withdrawal of his counsel upon denial of the motion for continuance, we respectfully submit that the opinion of the Supreme Court of North Carolina clearly disposes of this question for the reasons stated therein. To the same effect is the case of

Re Cool (1941), 19 N. J. Mis. R. 236, 18A (2d) 714, where the court said that the words "any appearance" meant an appearance in any one of several ways of making an appearance, and that a party's conduct, as well as other circumstances, were to be considered in determining whether he had actually appeared.

POINT 2.

Under any view the correct result has been reached, and therefore the petitioner has failed to show reversible error.

When we depart from the broad and abstract field which Congress intended to cover by the provisions of the Soldiers and Sailors Civil Relief Act of 1940, and narrow the case at bar to its true aspects under the facts disclosed by the record, we respectfully submit that a correct conclusion has been reached in the judgment of the trial court which was affirmed by the Supreme Court of North Carolina.

On the basis of mathematical calculation, the petitioner was only charged with those amounts which could be traced into his hands by the record. He was not charged with amounts which the record indicated might have been received by him. Under this record, would it be difficult to again obtain the same judgment against the petitioner? We respectfully submit that no other result could be reached. The petitioner admits the receipt of the money, and its trust character. The securities which he turned over to the court as trust assets were issued to him individually. (As to the liability of a trustee as affected by the fact that an investment was taken in his own name without indication of fiduciary capacity, see annotation in 106 A. L. R. 271.)

This rule has been announced in many decisions, and inasmuch as there seems to be no authority to the contrary, we will refer only to the following:

In the recent case of *Securities & Exchange Commission* v. *Chenery Corp.*, decided Feb. 1, 1943 (87 L. Ed. 411), Mr. Justice Frankfurter, writing for the court, says on page 416:

> "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' *Helvering* v. *Gowran*, 302 U. S. 238, 245, 82 L. Ed. 224, 229, 58 S. Ct. 154. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."

In the case of *Palmer* v. *Hoffman*, also decided on Feb. 1, 1943, 87 Law Ed. 427, Mr. Justice Douglas, writing for the court, says, beginning on page 431:

> "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. (Feb. 26, 1919) 40 Stat. 1181, c. 48, 28 U. S. C. A. 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."

In North Carolina the rule is stated in the case of *Cauble* v. *Southern Express Company*, 182 N. C. 448, 109 S. E. 267, as follows:

> "The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical

merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury; otherwise the interference of the court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial he must incur additional expense, and if there is no corresponding benefit he is still the sufferer. Besides courts are instituted to enforce right and restraint and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit. (Citing Authorities.)

Surely, when this rule, which is both sensible and just, is applied to the facts in hand, there is nothing to be gained by granting a new trial."

To the same effect is *Foxman* v. *Haynes*, 218 N. C. 722, 12 S. E. (2d) 528:

> "This court will not review a ruling of the court below which the record shows could not have prejudiced the complaining party, even if erroneous."

In accord is *Rankin* v. *Oates*, 183 N. C. 517, 112 S. E. 32, where Chief Justice Stacy says:

> "A new trial will not be granted when the action of the trial Judge, even if erroneous, could by no possibility injure the appellant."

See also *Collins* v. *Lamp*, 215 N. C. 719, 2 S. E. (2d) 258; *Bateman* v. *Kramer Lumber Company*, 154 N. C. 248, 70 S. E. 474; 34 LRA NS 615.

There is in Georgia a line of decisions applying this rule in which the court uses the expression that "the facts demanded the verdict." *Lunsford* v. *Armour*, 20 S. E. (2d) 594, and cases cited.

A careful study of the answer filed by the petitioner shows the lack of a meritorious defense. It has been held that he was a resident of the State of North Carolina when this action was commenced (see *Boone* v. *Boone*, decided by the Circut Court of Appeals for the District of Columbia, on Nov. 30, 1942, in which additional time has been given in the Supreme Court of the United States for making application for a Writ of Certiorari), and the North Carolina courts had undoubted jurisdiction of the trust fund here involved. The principal defense urged in the answer is that the North Carolina court did not have such jurisdiction. The defendant was present in person in New York when the deposition of Mr. Patterson was taken, and therefore fully advised of the facts. If he is dissatisfied he can only blame himself, as the facts seem to be of his making. His failure to refute the facts argues "that failure of one to present a fact necessary to his cause, when within his power to do so, must be taken as conclusive that such fact does not exist." *Black* v. *Wright*, 31 N. C. 447; *Smith* v. *Kappus*, 218 N. C. 758, 12 S. E. (2d) 693. The respondents have made an earnest effort to obtain the truth and to present it to the court. We respectfully submit that all speculation about the truth has been eliminated, and that the record conclusively establishes the facts.

Conclusion.

The litigants in this case are the petitioner, who is a lawyer admitted to practice in this Court, and the infant respondent, who is the beneficiary of the trust fund involved. Their respective rights depend on the facts in-

stead of on legal technicalities. The facts are free from doubt, and we therefore respectfully submit that the judgment complained of does substantial justice, and that under any view of the case the petitioner has not been deprived of any right.

Respectfully submitted,

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Counsel for Respondents.

J. E. SHIPMAN,
Hendersonville, N. C.
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 698.—October Term, 1942.

Daniel F. Boone, Petitioner,
vs.
Clarence M. Lightner, Theodore A. Lightner, Mrs. Alice Lightner Hopf, et al.

On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[June 7, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

The federal question in this case is whether a stay of proceedings against a defendant in military service has been refused under circumstances which denied rights given by the Soldiers' and Sailors' Civil Relief Act of 1940. The controversy in which he was engaged is for state courts to settle, and we deal with the facts only as they relate to this federal question.

The petitioner Boone was summoned into a state court in North Carolina in an action to require him to account as trustee of a fund for his minor daughter, to remove him as trustee, to surcharge his accounts for losses caused by illegal management, and to obtain personal judgment for deficiency in the fund.

Boone's mother-in-law, by will of which he was executor and trustee, created a trust fund for the education of her grandchildren, including one child of Boone's. Shortly after her death, and in September, 1938, another child was born to him. Since this child was unprovided for in the will the father-in-law made arrangements which upon his death put into Boone's hands a fund of about $15,000. It is conceded that the fund was a trust for the benefit of the daughter. There was controversy whether it was governed, as Boone claimed, by a letter signed by the father-in-law which placed no restriction on his discretion; or, as Mrs. Boone, who has been sustained by the courts of North Carolina, claimed, by the same conditions as the testamentary trust set up by her mother. For our purposes it is enough that it was admittedly a trust and that grounds were alleged sufficient to move the state court to require an accounting.

The summons and complaint were served on Boone personally in North Carolina on June 23, 1941. He was then in military service of the United States as a Captain stationed in the office of the Under Secretary of War in Washington.

Boone filed a verified answer denying the jurisdiction of the court, claiming that on June 23, 1941, the same day the summons was served, he changed his "domicile and legal residence" to Washington, D. C., and his daughter's as well. He admitted receipt of the fund in trust, asserted the trust was governed by the letter referred to, and pleaded that he "is not bound to report to any Court." He denied all charges of misconduct of the fund, denied that there were grounds for apprehension that the funds were unsafe, and asserted that "he has exercised at all times good faith in caring for this fund." He also stated that "he has not dissipated one penny of the fund, nor has he made any withdrawal from the fund since the day the money was turned over to him." He pleaded at length facts to support his claim that he was no longer domiciled in North Carolina and to support his allegation that the trust was "a voluntary trust not subject to the jurisdiction of any court or restricted in any way by the terms of any will."

On February 2, 1942, the cause came on for hearing. Boone moved for a continuance to the 25th of May, 1942, his counsel, Roy L. Deal, stating that he expected soon to be called into service and would be unable to try the case, and asking the continuance in order to give defendant ample time to employ other counsel. The request was granted, and that date peremptorily set for the trial. The court forbade transfer of securities constituting the trust and required that on the trial date they and any funds of the trust be turned over to the Clerk of the Court to abide further orders. Its order admonished that the court would at the earliest practical date ascertain the status of the trust fund and that the presence of Boone himself at the trial "is highly desirable," but left to the discretion of Boone and his counsel whether it was necessary. In order, however, to advise defendant Boone and his superior officers of the importance of the litigation, the court directed that a certified copy of the order be sent to the Adjutant General of the United States Army at Washington.

When the trial day came, Boone invoked the Soldiers' and Sailors' Civil Relief Act of 1940, and demanded that the trial be continued until after the termination of his service in the Army or

until "such time as he can properly conduct his defense." At this time there were before the trial court not only the pleadings and the affidavits submitted by Boone and his counsel but also certain depositions which Boone had made and procured and which had been returned to the court, and also Boone's own statement of transactions which accompanied certain securities and funds which he turned over to the Clerk of the Court. Boone was not present, but counsel appeared for him to move for a further continuance under the Soldiers' and Sailors' Civil Relief Act. This motion was denied, counsel who had presented the motion withdrew from the case, and the trial proceeded. The verdict of the jury went against Boone; and judgment was entered that the trust was governed by the terms of the will, that Boone had been guilty of serious misconduct of the trust fund, and that he be held personally liable for the consequent loss to the trust fund of more than $11,000, and removed as trustee.

Boone then appealed to the Supreme Court of North Carolina, on the merits as well as on denial of the continuance, and that court affirmed. 222 North Carolina 205. As the decision below presented an important question of construction of the Act, we granted certiorari.

The section of the Soldiers' and Sailors' Civil Relief Act of 1940 principally invoked is § 201,[1] which reads:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The positions urged by petitioner come to these: first, that defendant's military service in Washington rendered a continuance mandatory; second, if not mandatory, that the burden of showing that he could attend or would not be prejudiced by his absence was not on him, but on those who would force the

[1] 54 Stat. 1178, 1181, 50 U. S. C. App. § 521.
We express no opinion on the question whether Boone could have the judgment opened upon proper application under § 200(4), 50 U. S. C. App. § 520(4).

proceedings; third, that the Court did not make the finding required by the Act for denial of a stay; and last, that in any view of the law the trial judge abused his discretion in this case. The petition raises other questions, including the constitutional one as to whether he has been denied due process of law, which we do not discuss because in the light of the facts of the case they are frivolous.

1. The Act cannot be construed to require continuance on mere showing that the defendant was in Washington in the military service. Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

The Act of 1940 was a substantial reenactment of that of 1918. The legislative history of its antecedent shows that this clause was deliberately chosen and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act.[2] While this Court had no occasion to speak on the

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[2] As originally proposed, the Soldiers' and Sailors' Civil Relief Bill, S. 2859, 65th Cong., 1st Sess., provided in § 6 that:

"At any stage thereof any action or proceeding commenced in any court against a person in military service may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the defendant is not embarrassed by reason of his military service."

Accompanying "Notes as to the Provisions of the Bill" stated that a "sweeping exemption" such as that provided by most States in Civil War days, was "too broad, for there are many cases where the financial ability of soldiers and sailors to meet obligations in some way is not materially impaired by their entrance into service." Hearings and Memoranda before Senate Judiciary Committee on S. 2859 and H. R. 6361, 65th Cong., 1st and 2d Sess., p. 27.

Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that "a universal stay against soldiers is wasteful, because hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs. There is no earthly reason why the court proceedings should stay against them. It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves, and the court would say to them, 'No; your affair is a going concern; go ahead with the lawsuit. You have a lawyer, you have an agent, you have a corporation manager, and other things.'" *Id.* at p. 97.

As reported by the House Judiciary Committee, H. R. 6361, 65th Cong., 1st Sess., provided in § 201:

"That at any stage thereof any action or proceeding commenced in any

court against a person in military service during the period of such service or within 60 days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this act, unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought is not materially affected by reason of his military service."

The House Report on this bill, No. 181, 65th Cong., 1st Sess., stated:

"Instead of a rigid suspension of all actions against a soldier, a restriction upon suits is placed only where a court is satisfied that the absence of the defendant in military service has materially impaired his ability to meet that particular obligation. Most of the actions sought to be brought against soldiers will be for small amounts and will thus be in a local court where the judge, if he does not already know, will be in a favorable position to learn whether or not the defendant who seeks the benefit of the statute has really been prejudiced by his military service. Though not in military service, he may have property from which the income continues to come in irrespective of his presence; perhaps he may be some ne'er-do-well who only seeks to hide under the brown of his khaki; . . ." (p. 2.)

"The lesson of the stay laws of the Civil War teaches that an arbitrary and rigid protection against suits is as much a mistaken kindness to the soldier as it is unnecessary. A total suspension for the period of the war of all rights against a soldier defeats its own purpose. In time of war credit is of even more importance than in time of peace, and if there were a total prohibition upon enforcing obligations against one in military service, the credit of a soldier and his family would be utterly cut off. No one could be found who would extend them credit.

"But in any case a rigid stay of all actions against the soldier is too broad. There are many men now in the Army who can and should pay their obligations in full.

"On the other hand there are already tens of thousands of men in military service who will be utterly ruined and their families made destitute if creditors are allowed unrestrictedly to push their claims; and yet these same soldiers, if given time and opportunity can, in most cases, meet their obligations dollar for dollar. The country is asking 2,000,000 of its young men to risk their lives and, if need be, to give up their lives for their country. Before long even more will be asked to make the same sacrifice. Is it more than naked justice to give to the savings of these same men such just measure of protection as is possible?" (pp. 2-3).

"Section 201 illustrates how the committee has avoided an arbitrary, a rigid bill. The clause 'unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought, is not materially affected by reason of his military service,' is the key to the whole scheme of the bill. This mere fact of being in military service is not enough; military service must be the reason for the defendant not meeting his obligations." (p. 5.)

Congressman Webb, Chairman of the House Judiciary Committee, stated on the floor of the House, with reference to this bill, that:

"Heretofore during wars the various States have undertaken to pass the private stay laws for the benefit of the soldiers who are in the service of their country. If you will read the various laws of this kind which the committee has set out in its report, you will see what contrariety of such laws have been passed during recent years and during the various wars. The next material difference between this law and the various State laws is this, and in this I think you will find the chief excellence of the bill which we propose: Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the discretion as to dealing out even-handed justice between the creditor and the soldier, taking into consideration the fact that the soldier has been called to his country's cause, rests largely, and in some cases entirely, in the breast of the judge who tries the case.

"Manifestly, if this Congress should undertake to pass an arbitrary stay law providing that no creditor should ever sue or bring proceedings against

subject, the Act was generally construed consistently with this policy.[3]

Reenacted against this background without reconsideration of the question beyond a statement in the Senate Committee Report that "There are adequate safeguards incorporated in the bill to prevent any person from taking undue advantage" of its provisions,[4] we are unable to ignore or sterilize the clause which plainly vests judicial discretion in the trial court.

2. The Act makes no express provision as to who must carry the burden of showing that a party will or will not be prejudiced, in pursuance no doubt of its policy of making the law flexible to meet the great variety of situations no legislator and no court is wise enough to foresee. We, too, refrain from declaring any rigid doctrine of burden of proof in this matter, believing that courts called upon to use discretion will usually have enough sound sense to know from what direction their information should be expected to come. One case may turn on an issue of fact as to which the party is an important witness, where it only appears that he is in service at a remote place or at a place unknown. The next may involve an accident caused by one of his family using his car with his permission, which he did not witness, and

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any soldier while in the military service of his country, that would upset business very largely in many parts of the country. In the next place, it would be unfair to the creditor as well as to the soldier. It would disturb the soldier's credit probably in many cases and would deny the right of the creditor to his just debts from a person who was amply able to pay and whose military service did not in the least impair his ability to meet the obligation." 55 Cong. Rec. 7787.

On the floor of the Senate, § 201 was amended to substitute for "the ability of the defendant to comply with the judgment or order," "the ability of the defendant to conduct his defense," and to extend its protection to plaintiffs as well as to defendants. 56 Cong. Rec. 1696, 1753-1754. The amendments were agreed to in conference, with the managers stating with respect to the former amendment that "As the bill passed the House relief was to be given the party in military service unless his ability to comply with the judgment or order sought was not materially affected by such service. The amendment agreed on makes the test depend upon his ability to conduct the defense." 56 Cong. Rec. 3023. As so amended, the Bill became § 201 of the 1918 Act, 40 Stat. 442, which was carried into § 201 of the 1940 Act without amendment of the provision under consideration. While it is true that the discussion set forth in the preceding paragraphs related to a stay on a different basis than the one enacted, in so far as it deals with the question whether a mandatory or a discretionary stay was intended it is not made inapplicable or uninstructive by the amendment.

3 Davies & Davies v. Patterson, 137 Ark. 184; State *ex rel.* Clark v. Klene, 201 Mo. App. 408; cf. Swiderski v. Moodenbaugh, 44 F. Supp. 687, 45 F. Supp. 790; Dietz v. Treupel, 184 App. Div. 448; Gilluly v. Hawkins, 108 Wash. 79.

4 Sen. Rept. No. 2109, 76th Cong., 3d Sess., p. 2.

as to which he is fully covered by insurance. Such a nominal defendant's absence in military service in Washington might be urged by the insurance company, the real defendant, as ground for deferring trial until after the war. To say that the mere fact of a party's military service has the same significance on burden of persuasion in the two contexts would be to put into the Act through a burden of proof theory the rigidity and lack of discriminating application which Congress sought to remove by making stays discretionary. We think the ultimate discretion includes a discretion as to whom the court may ask to come forward with facts needful to a fair judgment.

In the present case, whoever might have had the burden originally, the continuance was finally denied upon a record which disclosed the facts so far as either party saw fit to do so. The defendant and his counsel submitted affidavits and the depositions and accounts before the court revealed facts relevant to the issue.

Whether, if the court knew only the existence of this complicated controversy and that the defendant was absent in military service, it could have cast upon the defendant the burden of showing that the litigation could not go ahead without prejudice to him, is not before us. The court made no such ruling. The defendant appeared, he pleaded his defense, he took depositions showing fully what had happened to the fund, and he supplied his own affidavit showing where he was and what he was doing. Regardless of whether defendant was under a duty to make a disclosure of his situation, once he undertook to do so, the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. One of these is that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." *Cooper* v. *Dasher*, 290 U. S. 106, 109. The trial court and the Supreme Court of North Carolina did just this. They did not deny his stay because he failed to meet their ideas of burden; they weighed the evidence he offered and found its conclusions discredited by its avoidance of supporting facts within his knowledge and not within that of his adversary. That is not a ruling on burden of proof. Finding that the courts below have proceeded upon no misapprehension of the law, we turn to their dealing with the facts of the particular case.

3. Some question is raised as to whether the findings of the trial court meet the requirements of the Act. In the order denying the continuance it found as a fact that "the defendant in this cause is deliberately and wilfully attempting to evade an ultimate determination of the issues involved in the litigation entitled as above, and is exercising his assumed right under the Act referred to above to avoid such determination." It also found the defendant "is not upon the motion for continuance acting in good faith." In the final judgment the court found as a fact "that the defendant has had ample time and opportunity to properly prepare his defense in this case and that his military service has not prevented him from doing this." It found that "defendant had full opportunity to prepare and put in his defense if he had one," and that "It is apparent that he has only sought to use the provisions of the Soldiers' and Sailors' Civil Relief Act as a shield for his wrong doing, and this Court, who once wore a U. S. uniform with pride does not intend for this to be done."

Of course this is not a finding in the words of the statute that the ability of the defendant "to conduct his defense is not materially affected by reason of his military service," but there is no doubt that it was intended to be in substance the equivalent. It was so treated by the Supreme Court of North Carolina and to send the case back for further findings seems unwarranted. The Act does not expressly require findings. It is one intended to apply to courts not of record as well as those of record, and it requires only that the court be of opinion that ability to defend is not materially affected by military service. We accept the findings as sufficiently evidencing the opinion of the court to that effect.

4. The final question is whether the evidence sufficiently supports the opinion or whether the order constitutes an abuse of discretion.

We think the opinion of the court that Boone's military service did not prevent him from being present and doing whatever could have been done by way of defense finds ample support in the evidence. Boone had been able to get away from Washington to go to New York for the taking of depositions on two separate occasions. He had long notice of the trial date and the court had placed in the files of his Department its order showing the desirability of his presence at that time. Boone, being a lawyer

and presumably knowing the gravity of the accusations against him, might be expected to make some move to get leave to be present. If it were denied, he might be expected to expose every circumstance of his effort to the court in his plea for continuance. Boone's affidavit, after reciting that he was assigned to the International Division, Headquarters, Services of Supply, Washington, D. C., says "The work in said Division is very heavy, and full time and some extra time are required of all officers in said Division, including the defendant. Prior to the declaration of War on Dec. 8, 1941 the work in this Division was very heavy, but since the declaration of War the volume of work has been greatly increased. No leaves whatever have been granted, except in cases of serious emergency."

Most lawyers trained in the equity tradition of trustee fidelity would regard a trial of this kind as a serious emergency. Did he apply for a leave at all? The affidavit pretty clearly implied that he had not. We think the court had ample grounds for the opinion that Boone made no effort to attend to duties that should weigh heavily upon the honor of a lawyer-trustee.

There was likewise support for the opinion that the failure to be represented by counsel did not result from Boone's military service. On February 2, 1942, the court granted his request for a continuance and set the case for trial on May 25, 1942. It was stated to the court that counsel then acting for him was expecting to be called immediately into military service, and it would be necessary for defendant to procure additional counsel. Nevertheless, when the trial date arrived, the fact that this counsel had gone into service on May 13, 1942, was urged as a reason for further postponement. No showing whatever was made as to any effort to obtain other counsel in the long interval allowed by the court for the purpose. This counsel was also stationed at Washington and said he "would not assume to ask for leave at the present time, so soon after having repo.ted for duty."

On the trial date defendant was nevertheless represented in court by local counsel. That counsel however was consulted only three or four days before the trial date and was employed for the sole purpose of making the motion for continuance, and when the court ruled on it he withdrew and declined to proceed further. The defendant's accounts presented to the trial judge showed disbursements since the beginning of the action and before trial

for the following matters, among others, in connection with this case: On August 15, 1941, defendant's deposition was taken at Washington, D. C. This entailed a reporter's fee of $66.00 and a fee of $248.88 paid a Detroit attorney for appearing at the proceeding. On November 3 and 5, 1941, depositions were taken in New York City with the defendant present. These involved a court reporter's fee of $32.25, and fees in the amount of $375.00 for the Detroit attorney and New York counsel obtained to assist him. This item carried a notation that it did not "include services rendered in the taking of depositions in other cases on same date." From August 4, 1941, to January 26, 1942, Deal, the attorney who had represented defendant before withdrawing to accept a commission in Washington, received $218.00 for his services in representing defendant in the case. Two days after judgment, another lawyer from the firm of counsel who had withdrawn after making the motion of May 25 appeared and moved to set the verdict aside and took an appeal, later filing extensive assignments of error. Counsel who had withdrawn from the trial argued the appeal in the Supreme Court of North Carolina.

At all times since the action began defendant has also been represented by counsel from Detroit, Michigan. His inability to appear on the trial date was explained on the ground that he was "definitely engaged at the present time in the trial of cases at Detroit which will require his presence in Court there for approximately thirty days." No affidavit from this counsel was produced, and no explanation is made as to how it came that other "cases" were given priority over this in view of the long notice of the trial date and its importance to the client.

In this Court, Boone is represented by his Detroit counsel and by Deal, the lawyer who withdrew from the case to accept a commission in Washington. Besides these, there also appear four other lawyers, none of whom are included in the five who have represented him at previous stages in the case.

In addition to the facts presented to the trial court which we have recited, the trial court apparently considered matters not of record in this case, but of which he took judicial notice. He recites that "the motion to continue is made after the defendant's refusal in one or more instances arising out of litigation respecting the subject matter and personnel involved in this action to appear in the Courts of North Carolina, even on citation for contempt." We

know nothing of these events and disregard this ground of the court's action.

The court was dealing not only with an individual but with a trustee, one charged with default in his duty, and with a fund which was said to be in jeopardy. Defendant in spite of his military service in Washington was continuing to administer the fund. The defendant was a member of the bar, and the charges struck at his honor as well as at his judgment. Instead of seeking the first competent forum and the earliest possible day to lay his accounts out for vindication, he sought to escape the forum and postpone the day. He was both present and represented by counsel when depositions were taken which establish his speculation with the trust funds in his personal margin account. We think the record amply supports the conclusion of the trial judge that the claim that military service would prejudice the conduct of his defense, was groundless, and that the absence of himself and all of his numerous and not uncompensated counsel on the day of judgment was dictated wholly by litigious strategy.

The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether prejudice may result from absence, or absence result from the service. Absence when one's rights or liabilities are being adjudged is usually *prima facie* prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.

Affirmed.

Mr. Justice BLACK, dissenting.

The petitioner is a soldier who was on duty in Washington throughout the course of the litigation in North Carolina of this action against him. He duly claimed the protection of the Soldiers' and Sailors' Civil Relief Act of 1940, and rests upon it here. I think he should prevail.

The relevant statutory provision before us may be summarized as follows: Actions brought against a person in military service shall be stayed upon application of that person "unless, in the

opinion of the court, the ability of the . . . defendant to conduct his defense is not materially affected by reason of his military service."

The statutory language has no legislative history and has not previously been interpreted by this Court. The elaborate legislative history set forth by the Court is a history of a clause which was stricken from the 1917 Act, which is not before us now, and which, on its face, has a meaning wholly different from the clause under construction.[1] Hence the problem is a narrow one of analysis of the words of the statute itself.

I believe that the clause under consideration requires that an action against a person in military service must be stayed unless the trial judge concludes (a) that no personal judgment will result and that the action will in effect preserve the interests of all the parties for the duration of the war; or (b) that the defendant is only a formal party; or (c) that the defendant need not be present for any purpose, either before, during, or after the trial, and that he will be adequately represented and has no need to testify or participate in any way; or (d) that the defendant's military service does not preclude him from having ample opportunity to get ready for, and to take his necessary part in the litigation.

In my opinion, none of these conditions are met here. Although the action began as a proceeding to preserve the trust estate, which was quite proper, it terminated with a personal judgment against the petitioner for $11,000 after a trial by jury of many disputed facts. The petitioner was obviously not merely a formal party. One issue in the case was whether he had dissipated trust funds, and for such an inquiry his presence to hear the evidence against him was essential to his interests and his own testimony was, in the words of the trial court, "highly desirable".

[1] The clause for which the Court gives the legislative history is as follows: An action against a person in military service shall be stayed, upon request, "unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought is not materially affected by his military service." This means, in rough substance, what its legislative history says, that the action was to be stayed except where the defendant could readily pay a judgment against himself. But that language was removed and the present provision inserted: the action upon proper request shall be stayed unless in the opinion of the trial judge, "the ability of the defendant to conduct his defense" is affected by military service. The difference between ability to pay a judgment, and ability to conduct a defense is so great that the two clauses have substantially nothing in common. The ability to pay clause has been left in some sections of the Act, as, e. g., §§ 203 206, but it is not before us here.

The sole possible ground for the Court's action, therefore, is that the defendant could have been present and, wilfully taking advantage of the Act, chose instead to absent himself. In reaching this result the Court engages in precisely the speculation which I think the Act prohibits. The Court does not know, and the state court did not try to find out, whether Boone applied for a leave or disclosed its urgency to his superiors; it concludes that he did neither. The Court does not know whether Boone attempted to find new counsel; it assumes that he did not. The Court does not know why Boone chose to participate in certain other law suits against him conducted simultaneously with this one; it assumes that the others were less important than this case. The Court can not know whether the petitioner truly owes the amount of the judgment against him; it must assume that he does because of a proceeding conducted against him in his absence.[2]

The Court emphasizes that Boone is a member of the bar. But for the duration of the war, he is primarily a soldier, with a job to do which Congress intended should overshadow personal interests, whether his, or those of others who seek a personal judgment against him. It is difficult for me to believe that he could adequately have prepared for this trial without a leave of many weeks. The purpose of the Act is to prevent soldiers and sailors from being harassed by civil litigation "in order to enable such persons to devote their entire energy to the defense needs of the Nation." § 100. He is required to devote himself to serious business, and should not be asked either to attempt to convince his superior officers of the importance of his private affairs or to spend his time hunting for lawyers.

The trial court should, at the very least, have inquired of the appropriate military authorities whether the petitioner could be granted ample leave to prepare his defense and be present for trial. If the Act does not require this, it serves little purpose. It may be argued that this petitioner, a man of knowledge and experience, is as competent to ask his superior officer for leave as is the trial court; but the argument fails because the policy set here, no matter how many qualifications the Court tries to work into it, will shoot far beyond the confines of this case. In

[2] Had this been a judgment by default, Boone might have it set aside upon proper motion made at any time within "ninety days after the termination" of his military service. § 200(4). Whether that section will permit Boone to attack this judgment after the war is a question which the Court expressly reserves.

the course of the war, numerous actions will be brought against soldiers who have never heard of this Act and have no notion that this Court might want them to apply to their superior officers for leave and to make and file a formal record of their superior officers' refusal.

I fear that today's decision seriously limits the benefits Congress intended to provide in the Soldiers' and Sailors' Civil Relief Act. It apparently gives the Act a liberal construction for the benefit of creditors rather than for the benefit of soldiers. It places in trial judges an enormous discretion to determine from a distance whether a person in military service has exercised proper diligence to secure a leave, or whether it is best for the national defense that he make no application at all. These are questions on which the judiciary has no competence, since only the military authorities can know the answers.